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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 BRUCE J. STANIFORTH,

12 Plaintiff,

13 v.

CASE NO. 14cv1899-GPC-JLB

**ORDER FOLLOWING ORDER TO
SHOW CAUSE**

14 TOTAL WEALTH MANAGEMENT
15 INC., a California corporation;
16 ALTUS CAPITAL MANAGEMENT,
17 LLC, a Delaware limited liability
18 company; ALTUS CAPITAL
19 OPPORTUNITY FUND LP, a
20 Delaware limited partnership; JACOB
21 K. COOPER, an individual; NATHAN
22 MCNAMEE, an individual; DAVID
23 SHOEMAKER, an individual;
24 CAPITA ADVISORS, INC., a
25 California corporation; FINANCIAL
26 COUNCIL, INC., a California
27 corporation; PINNACLE WEALTH
28 GROUP, INC., a California
corporation;; and DOES 1 through
100, inclusive,

Defendants.

On February 6, 2015, Receiver Kristen A. Janulewicz (“Receiver”) filed a Notice of Pending Receivership regarding her appointment as a temporary Receiver for Total Wealth Management Inc., and its subsidiaries and affiliates, including, but not limited to Altus Capital Management, LLC, in *Securities and Exchange Commission v. Total*

1 *Wealth Management*, Case No. 15-cv-226-BAS (DHB) (the “Receivership Action”).
 2 (ECF No. 34.)

3 On February 12, 2015, District Judge Cynthia Bashant (hereinafter “the
 4 Receivership Court”) issued a preliminary injunction order, wherein she appointed the
 5 Receiver as a permanent receiver. (Case No. 15-cv-226-BAS (DHB), ECF No. 8.) The
 6 order appointing a permanent receiver provides that:

7 [E]xcept by leave of this Court, during the pendency of this receivership,
 8 all clients, investors, trust beneficiaries, note holders, creditors, claimants,
 9 lessors and all other persons or entities seeking relief of any kind, in law
 10 or in equity, from Defendant Total Wealth Management, Inc., or its
 11 subsidiaries or affiliates . . . are hereby restrained and enjoined from,
 12 directly or indirectly, with respect to these persons and entities . . .
 commencing, prosecuting, continuing or enforcing any suit or proceeding
 (other than the present action by the SEC or any other action by the
 government) against any of them

13 (*Id.* at 11.)

14 On February 17, 2015, this Court issued an Order to Show Cause (“OSC”) why
 15 this action should not be stayed during the pendency of the receivership in *Securities*
 16 *and Exchange Commission v. Total Wealth Management*, Case No. 15-cv-226-BAS
 17 (DHB). (ECF No. 35.) Plaintiff and the Receiver both filed responses to the OSC
 18 (ECF Nos. 37 & 38.) None of the other Defendants filed responses.

19 BACKGROUND

20 On April 15, 2014, the Securities and Exchange Commission (“SEC”) issued an
 21 Order Instituting Administrative and Cease-and-Desist Proceedings in its investigation
 22 of Total Wealth Management, Inc. (“TWM”), Jacob Keith Cooper (“Cooper”), Nathan
 23 McNamee (“McNamee”), and Douglas David Shoemaker (“Shoemaker”). (Case No.
 24 15-cv-226-BAS (DHB), ECF No. 3-3, Ex. 1.)¹ According to the SEC’s order,
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26 ¹ The Court takes judicial notice of the SEC’s order, a copy of which was filed in the
 27 Receivership Action. Under Federal Rule of Evidence 201, a court may take notice of facts not subject
 28 to reasonable dispute that are capable of accurate and ready determination by resort to sources whose
 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Public records are a proper subject
 of judicial notice. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866

1 McNamee is the current president and chief compliance officer of TWM, an investment
 2 adviser representative for TWM, and the sole founder and operator of Capita Advisors,
 3 Inc. (“Capita”). (*Id.*, Ex. 1 ¶¶ 1, 3, 11.) Shoemaker is a co-founder and former chief
 4 compliance officer of TWM, an investment adviser representative for TWM, and the
 5 sole founder and operator of Financial Council, Inc. (“Financial Council”). (*Id.*, Ex.
 6 1 ¶¶ 1, 3, 12.) The SEC alleges that TWM entered into revenue sharing arrangements
 7 with several investment funds (including Altus funds), such that when TWM placed
 8 its clients’ investments in those funds, TWM received sharing fees. (*Id.*, Ex. 1 ¶¶ 25,
 9 53.) TWM, in turn, paid Cooper, McNamee, and Shoemaker a portion of the revenue
 10 sharing fees it received. (*Id.*, Ex. 1 ¶ 26.)

11 The SEC further alleges that “[a]bout the same time that the Altus Capital Fund
 12 was established [by Cooper], Cooper formed Pinnacle, and he advised Shoemaker and
 13 McNamee to form Financial Council and Capita, respectively.” (*Id.*, Ex. 1 ¶ 27.) After
 14 forming their respective “consulting” companies, McNamee and Shoemaker would
 15 routinely invoice TWM for “consulting fees,” even though McNamee and Shoemaker
 16 did not do any consulting work. (*Id.*, Ex. 1 ¶ 28.) The money TWM paid in response
 17 to these invoices instead represented McNamee and Shoemaker’s shares of the revenue
 18 sharing fees. (*Id.*)

19 DISCUSSION

20 The issue presented by the Court’s OSC is whether the injunction issued by the
 21 Receivership Court should be extended to stay this action. The Receiver acknowledges
 22 that the preliminary injunction does not bar prosecution of litigation against the
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25 n.1 (9th Cir. 2004); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Courts may also
 26 take judicial notice of relevant court records under Federal Rule of Evidence 201. *See United States*
 27 *ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (“[W]e
 28 ‘may take notice of proceedings in other courts, both within and without the federal judicial system,
 if those proceedings have a direct relation to matters at issue.’” (citation omitted)). The Court finds
 that the SEC’s order is properly noticeable.

1 individual defendants in this case or entities not deemed to be Receivership Entities².
2 (ECF No. 38 at 1.) However, for practical reasons, the Receiver recognizes that the
3 injunction “has significant implications” in connection with discovery, summary
4 judgment, and potential judgment enforcement actions that may be undertaken against
5 the individual and non-receivership defendants. (*Id.* at 4.) Additionally, the Receiver
6 believes “that those defendants in this matter to whom the litigation stay does not apply
7 will almost certainly become subjects of the Receiver’s investigation effort, and may
8 themselves become defendants or relief defendants in the Receivership Case or in
9 Receivership Asset recovery litigation brought by the Receiver.” (*Id.* at 5.) For this
10 reason, failing to impose a blanket stay in this case could result in a “race to the
11 courthouse,” wherein some claimants may obtain relief first, to the detriment of other
12 claimants. (*Id.*) The Receiver also argues that judicial economy militates against
13 evaluating claims in a piecemeal fashion. (*Id.*) Accordingly, the Receiver does not
14 object to the Court staying the action in its entirety pending resolution of the
15 Receivership Case. (*Id.*)

16 Plaintiff does not object to the Court staying the entire case in the interest of
17 judicial efficiency, provided that the stay can be lifted in the future as to those
18 individuals not expressly covered by the Receivership Court’s injunction. (ECF No.
19 1.) It is Plaintiff’s understanding that only “Defendant Total Wealth Management, Inc.,
20 or its subsidiaries or affiliates” are covered by the injunction—the individual
21 defendants are not. (*Id.*) Plaintiff further understands that the parties will not be able
22 to conduct discovery with respect to the covered entities. (*Id.*) It is for this reason that
23 Plaintiff does not object to staying the entire case, even if the individual defendants are
24 not expressly covered by the Receivership Court’s litigation stay. (*Id.*)

25 “The power of a district court to impose a receivership or grant other forms of
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27 ² The Receiver defines the “Receivership Entities” as “Total Wealth Management, Inc. and
28 its subsidiaries and affiliates, including but not limited to Altus Capital Management, LLC.” (ECF
No. 38 at 1.)

ancillary relief . . . derives from the inherent power of a court of equity to fashion effective relief.” *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The “primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors.” *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). In order to effectuate this goal, the receivership court has authority to enjoin individuals from proceeding in another court in order to prevent interference with a receivership action. *Wencke*, 622 F.2d at 1371-72 (upholding district court’s order staying state action by nonparties against receivership entities because “[t]here is a strong federal interest in insuring effective relief in SEC actions brought to enforce the securities laws”).

Plaintiff is correct that he will not be allowed to proceed with discovery against TWM, Altus Capital Opportunity Fund LP, Altus Capital Management, LLC, and Cooper. The Court finds that discovery falls squarely within the Receivership Court’s order prohibiting investors from “prosecuting [or] continuing . . . any suit or proceeding” against the defendants in the Receivership Action. (*See* Case No. 15-cv-226-BAS (DHB), ECF No. 8 at 11.) Moreover, if this Court were to allow Plaintiffs to propound discovery against TWM, Altus Fund, Altus Capital, and Cooper, the Receiver would be required to expend time and funds from the receivership *res* in order to respond. The purpose of the receivership and the litigation stay issued by the Receivership Court is to protect receivership assets and to allow the Receiver time to focus on identifying and recovery receivership assets. (*Id.* at 2, 9-10) (finding that “[g]ood cause exists to believe that, unless restrained and enjoined by order of this Court, Defendants will dissipate, conceal, or transfer assets” and that a permanent receiver was necessary “to conduct such investigation and discovery as may be necessary to locate and account for all of the assets” and “take such action as is necessary and appropriate to preserve and take control of and to prevent the dissipation, concealment, or disposition of any assets”). Thus, to allow discovery against TWM, Altus Fund, Altus Capital, and Cooper would be contrary to the spirit and intent, in

1 addition to the express language, of the Receivership Court's injunction order.

2 The Court further finds it appropriate to stay this entire action at this time. The
3 Receiver indicated that the defendants not expressly covered by the injunction "will
4 almost certainly become subjects of the Receiver's investigation effort, and may
5 themselves become defendants or relief defendants in the Receivership Case or in
6 Receivership Asset recovery litigation brought by the Receiver." (ECF No. 38 at 5.)
7 This suggests that assets of the McNamee/Shoemaker Defendants may at some future
8 date become part of the receivership *res*. Thus, allowing Plaintiff to proceed forward
9 against these defendants could put him ahead of other claimants in recovering
10 receivership assets. Absent a showing of a substantial injury if he is not allowed to
11 proceed, which Plaintiff does not allege, the Court finds no reason to try this case in
12 a piecemeal fashion. For this reason, and because Plaintiff does not object to staying
13 the entire case, the Court hereby **STAYS** this case in its entirety.

14 In so ruling, the Court is cognizant of the fact that the Receivership Court is
15 more knowledgeable about the status of the SEC's administrative action and the
16 Receivership Action. Absent an intervening ruling from the Receivership Court that
17 affects this case, the Court orders the Receiver to provide this Court with an update
18 regarding the status of *Securities and Exchange Commission v. Total Wealth*
19 *Management*, Case No. 15-cv-226-BAS (DHB) on or before **August 14, 2015**.

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1 **CONCLUSION**

2 For the foregoing reasons, the Court:

3 1. **STAYS** this case in its entirety and,

4 2. **ORDERS** the Receiver to provide this Court with an update regarding the
5 status of *Securities and Exchange Commission v. Total Wealth Management*, Case No.
6 15-cv-226-BAS (DHB) on or before **August 14, 2015**.

7 **IT IS SO ORDERED.**

8 DATED: May 12, 2015

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10 HON. GONZALO P. CURIEL
11 United States District Judge
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